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In the Supreme Court of the United States

No. 444

OCTOBER TERM, 1963.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

vs.

KOHN, INC., THE KOHN BREWERY CO., PAULINE KOHN, ADAM J. KOHN, STEPHEN ZARICH and PETER ZARICH,

Respondents.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

vs.

THE STROH BREWERY COMPANY and MORTON R. ENGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals For the Sixth Circuit.

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ACE BEER DISTRIBUTORS, INC.,

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vs.

THE STROH BREWERY COMPANY and MORTON R. ENGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI To The United States Court of Appeals For the Sixth Circuit.

Ace Beer Distributors, Inc., petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cases on June 11, 1963.

OPINIONS BELOW.

The opinion of the District Court is not reported. It is printed in the Appendix Record on Appeal at pages 28a to 33a, of which nine extra copies are filed herewith.

The opinion of the Court of Appeals has not yet been officially reported. An unofficial copy appears at Paragraph 70,809 of the C. C. H. 1963 Trade Cases. A copy is appended to this petition, as Appendix A (*infra*, page 27).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 11, 1963 (*infra*, p. 34). The jurisdiction of this Court is invoked under the act of June 25, 1948, c. 646(1), 62 Stat. 928(1), 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Where a complaint alleges that a Michigan brewery for whom petitioner was the exclusive wholesale distributor for the Youngstown, Ohio area secretly and tortiously conspired and prearranged with another Youngstown distributor-conspirator to destroy petitioner's business and to eliminate petitioner as a competitor in such market area by secretly

(a) soliciting petitioner's trusted managerial employees to violate their duty of loyalty;

(b) inducing and arranging for such managerial employees to quit petitioner simultaneously with the termination by the brewery of petitioner's distributorship agreement and to enter the employ of such other distributor; and

(c) inducing petitioner's driver-salesmen to enter the employ of such other distributor

well knowing that, as a consequence of the execution of the conspiracy, petitioner's business would be and was in fact destroyed within a matter of hours, whether it was proper to dismiss the complaint on motion for judgment on the pleadings on the ground that the brewery had the "right" to cancel petitioner's distributorship, and that the creation and execution of the conspiracy was, as a matter of law, merely equivalent to the unilateral selection "without more" by a trader of the customer with whom he would deal.

2. Where a complaint alleges a conspiracy to destroy a distributorship busines and to suppress competition in commerce by secretly causing employees of one distributor to violate their duty of loyalty in the interest of a brewery and of another distributor who were parties to the conspiracy, "triggered" by the brewery-conspirator's giving notice of a refusal to deal, whether relief under the antitrust laws may be denied the former distributor on the ground that the destruction by conspiracy of the former's business is not an unreasonable restraint of trade.

3. Whether the erroneous course of decision below requires the exercise of this Court's power of supervision, both by reason of an application of incorrect rules of law to completed conspiracies to restrain trade and by further reason of the misapplication of summary procedures to allegations of fact.

STATUTES INVOLVED.

The statutory provisions involved are Sections 1 and 7 of the Sherman Act, Act of July 2, 1890 c. 647, Sections 1 and 7, 26 Stat. 209, 210, 15 U. S. C. Sections 1 and 7; and Section 4 of the Clayton Act, Act of October 15, 1914, c. 323, Section 4, 38 Stat. 731, 15 U. S. C. Section 15. They are printed in Appendix B, *infra*, page 35.

STATEMENT OF THE CASE.

This is a treble damage action alleging violation of the Sherman Act, brought in the United States District Court for the Northern District of Ohio, Eastern Division pursuant to Section 4 of the Clayton Act. The District Court entered a final judgment dismissing the complaint, upon respondent's motions for judgment on the pleadings, which the Court of Appeals for the Sixth Circuit affirmed.

The complaint in this case shows and alleges a secret, tortious conspiracy by a brewery engaged in interstate commerce to forestall competition with its products in a local market upon the shift of a distributorship. The brewery was not content with merely altering its distributorship arrangements. It meant to insure that upon completion of the changeover, its former distributor was commercially sterilized and without the capacity to continue in business to handle a competitive line. The thrust of the conspiracy was the transfer from petitioner to a new distributor of the sales capability of the petitioner in order to forestall competition both with the brewery's products and its new distributor.

The forestalling was accomplished by means of the preemption of the business good will and sales capacity of the entire administrative and sales organization of the predecessor distributor. The preemption was executed by means of a secret and tortious conspiracy developed over many months by the brewery and its representatives in the State of Ohio, the officers and stockholders of the prospective new distributor, and by the trusted key managerial employees of petitioner. The key employees were lured into the conspiracy by prospects of profit-sharing arrangements and options upon the stock or assets of the new distributorship, and into breaching their duty of loyalty to petitioner both by maintaining silence concerning the con-

spiracy and by inducing the driver-salesmen in petitioner's employ to leave *en masse* to work for the new distributor. The destruction of petitioner's business as an operating entity and the throttling of potential competition was a foregone conclusion since the conspirators knew that it was impossible for petitioner to rebuild its sales capability in any reasonable period of time.

The prearranged demise was "triggered" by the brewery's refusal to deal with petitioner. Simultaneously with the issuance of such refusal, the distributorship was switched to the co-conspirators, and the key employees and driver-salesmen quit petitioner's employ for the new distributor, taking with them petitioner's confidential sales data.

The grounds for the District Court's dismissal of the complaint (Tr. 28a-33a) were twofold:

1. The alleged objective to be achieved by the conspiracy was not rendered obnoxious by the Sherman Act since there was no lessening of competition, restraint of trade, or injury to the public.

2. Since the right of the manufacturer to choose with whom he will deal is not actionable unless there is present "some other factor odious to the intent of the theory behind the antitrust laws," the complaint failed to allege any cause of action. The District Court placed principal reliance upon *Schwing Motor Company vs. Hudson Sales Corporation*, 138 F. Supp. 899 (D. Md. 1956), *aff'd.*, 239 F. 2d 176 (4 Cir. 1956), *cert. den.*, 355 U. S. 823 (1957), and *Packard Motor Car Co. vs. Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir. 1957), cert. denied 355 U. S. 822 (1957).

The Court of Appeals justified the conspiracy to destroy conspirator's business by reference to the right of unilateral refusal to deal, holding "the fact that a refusal to deal with the particular buyer *without more*, may have

an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act." The Court of Appeals similarly held that the refusal to deal was not unlawful since it did not produce an unreasonable restraint of trade, such as price fixing, elimination of competition or the creation of a monopoly, i.e., no "public injury." Said the court:

> "The substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade." (Appendix A *Infra*, page 33.)

The Court of Appeals did not consider whether the refusal to deal was "tainted" by the intent to eliminate a competitor by tortious conspiracy or by the unlawful restraint resulting from the conspirators' intended and purposeful denial of a trader's right to engage in commerce.

The complaint was filed June 3, 1959 (Tr. 1a). It alleges that the petitioner, Ace Beer Distributors, Inc. ("Ace"), is an Ohio corporation, and a wholly owned subsidiary of the Genesee Distributing Co. ("Genesee"), also an Ohio corporation. Since the year 1936, Genesee and defendant Stroh Brewery Company, Inc. ("Stroh") had been operating under an agreement wherein Genesee was designated the exclusive distributor in Mahoning and Trumbull Counties, Ohio of beer and other products manufactured by Stroh. Stroh has its principal place of business in Detroit, Michigan (Complaint, Pars. 2, 3, 8; Tr. 5a, 6a, 7a).

In January, 1956, Genesee and Stroh agreed that Genesee would set up a separate organization to distribute

Stroh products exclusively. Stroh subsequently insisted upon the incorporation and formation of petitioner as a separate company, and agreed that, upon such incorporation, petitioner would be substituted as the exclusive Stroh distributor in Mahoning and Trumbull Counties, Ohio (Complaint, Par. 8; Tr. 7a).

Petitioner fulfilled every requirement of its distributorship agreement with Stroh and exerted its best efforts to sell and promote the sale of Stroh's products, and to that end petitioner incurred considerable sales and advertising expenses (Complaint, Par. 9, Tr. 7a). It leased a warehouse, purchased a cooler, warehouse and office equipment, leased trucks and a truck-trailer, and obtained the requisite permits from governmental agencies.

Respondent Stephen Zarich was petitioner's manager in charge of all operations and personnel. He was at all times in a position of great trust and responsibility, having charge and custody of all petitioner's files, records and correspondence. Zarich was in the employ of petitioner since its incorporation and prior thereto was in the employ of Genesee since January 12, 1953 (Complaint, Par. 6; Tr. 6a).

Petitioner sold Stroh's products at an annual rate of between $700,000.00 and $750,000.00. At all times referred to in the complaint, petitioner and Stroh were engaged in interstate commerce, Stroh's beer being transported from Detroit, Michigan in a regular, continuous and uninterrupted flow to distributors and ultimate users in the State of Ohio. Stroh was the only company for which petitioner acted as a distributor, and Stroh was petitioner's sole source of merchandise for distribution and sale (Complaint, Pars. 3, 11, 12; Tr. 6a, 7a).

For many months prior to April 20, 1959, The Kohn Beverage Co., and its principal officers and stockholders,

Pauline Kohn and Adam J Kohn, conspired with Stroh, Harold S. Wagoner, Stroh's Vice-President in Charge of Sales,[1] and Morton R. Engel, Stroh's Ohio Sales Manager

(a) to destroy the petitioner's business, good will and organization;

(b) to induce key employees of petitioner to breach their duty of loyalty to petitioner by joining in the conspiracy without disclosing the conspiracy to petitioner;

(c) to keep secret from petitioner and its officers the conspiracy, and each and every step thereof;

(d) to appropriate all of petitioner's employees for the direct benefit of the Kohns and their corporate organizations, with a resulting contemplated benefit to Stroh; and

(e) to eliminate petitioner as a beer distributor in interstate commerce and thereby to suppress any prospective competition in commerce with Kohn, Inc., a new corporation, in the sales of Stroh's beer (Complaint, Par. 13; Tr. 8a).

To accomplish petitioner's competitive demise, it was further agreed that Stroh would cancel respondents' distribution franchise without prior notice and would simultaneously issue a new franchise to a corporation Kohn, Inc., to be formed by the Kohn Beverage Co., Pauline Kohn and Adam J. Kohn.

In furtherance of this conspiracy, Kohn, Inc. was incorporated on March 3, 1959 with Pauline Kohn and Adam J. Kohn as principal officers and shareholders. The Kohns and the Kohn Beverage Co., under false names and without disclosing the intended purpose, negotiated a lease for

[1] Mr. Wagoner was dismissed as a defendant in the litigation since he was not a resident of Ohio. (Tr. 2a.)

a suitable building in the Youngstown area from which Kohn, Inc. could operate. These negotiations were concluded on or about April 1, 1959. The building was promptly placed in readiness for Kohn, Inc.'s operation as a Stroh distributorship. These respondents further obtained a fleet of trucks from The Kohn Beverage Co., of Akron, Ohio, which were placed in readiness to commence operations as soon as Kohn, Inc. obtained a permit from the Ohio Department of Liquor Control and as soon as petitioner's Stroh franchise was cancelled.

In January, 1959 and in each of the ensuing months until April 20, 1959, the respondents, or some of them, contacted petitioner's manager, Stephen Zarich, and also contacted his brother, Peter Zarich, Genesee's Route Superintendent, both long, trusted and key employees of petitioner and Genesee.

Through the inducements of employment and stock options in the newly formed Kohn, Inc., the Zarichs were lured into the conspiracy. Both agreed to keep secret from their respective employers the impending loss by petitioner of the Stroh distributorship. It was arranged with the Kohns that Stephen Zarich and Peter Zarich would join the staff of Kohn, Inc. upon the obtaining by Kohn, Inc. of the distributorship of Stroh's beer in Mahoning and Trumbull Counties in the State of Ohio. Stephen Zarich and Peter Zarich were also each given an option to purchase the stock or assets of Kohn, Inc. at the book value thereof, and a one-third interest in the profits of Kohn, Inc.

At the instance of the respondents, Stephen Zarich and Peter Zarich thereupon contacted petitioner's drivers and salesmen to induce these employees to leave petitioner *en masse* to become employed by Kohn, Inc. (Complaint, Par. 14; Tr. 8a-10a).

On April 20, 1959, the conspirators' plans and prior arrangements completed, Stroh "triggered" the execution of the conspiracy by cancelling petitioner's franchise for the distribution of Stroh's beer and by simultaneously shifting the sale of its merchandise to Kohn, Inc. for distribution and sale in Mahoning and Trumbull Counties, Ohio (Complaint, Par. 15; Tr. 10a).

On Stroh's cancellation of petitioner's distributorship, Stephen Zarich and Peter Zarich left their respective employments without prior notice. Similarly, all but two (2) of petitioner's drivers and salesmen without notice to petitioner quit its employ on the same day, and immediately commenced employment with Kohn, Inc. (Complaint, Par. 14, Tr. 10a).

The respondents knew at all times that in the then state of the Youngstown labor market it would be impossible for plaintiff to hire other employees with comparable training and experience, and that petitioner's business would necessarily be destroyed (Complaint, Par. 14; Tr. 10a).

Stephen Zarich, as custodian of plaintiff's business records, including customer lists, route quota records, sales quota files and other business records and documents, without petitioner's knowledge or consent, appropriated these documents, files and records and took them from petitioner's premises (Complaint, Par. 16, Tr. 10a).

Following the filing of the complaint, petitioner moved for a preliminary injunction, which the District Court denied, and this ruling was affirmed by the Court of Appeals for the Sixth Circuit without opinion, 280 F. 2d 424 (6th Cir. 1960).

Answers to the complaint were promptly filed by the various respondents and extensive discovery was undertaken by both sides. On February 20, 1961, requests for

trial was filed and on May 9, 1961 the action was pretried (Tr. 3a). After respondents made discovery of petitioner in May of 1961, petitioner moved for production and inspection of documents. This motion was opposed and motions for judgment on the pleadings were filed by all respondents other than Stroh and Engel (Tr. 3a, 4a).

In September, 1961, the District Judge granted the motions for judgment on the pleadings (Tr. 4a). Subsequently, Stroh and Engel also filed motions for judgment on the pleadings and final judgment thereon was entered on March 2, 1962. Petitioner appealed to the Court of Appeals for the Sixth Circuit, which heard argument upon the consolidated appeals on December 2, 1962 and rendered judgment on June 11, 1963.

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

The decision of the court below is in conflict with the decisions of this Court which have held that: (1) The antitrust laws protect the opportunity of a single trader to compete in business under Section 4 of the Clayton Act; and (2) The unilateral right of customer selection and refusal to deal cannot justify unlawful conduct or agreement including a conspiracy or combination to destroy a competitor, or achieve other unlawful or unreasonable restraints of trade.

The court below completely failed to distinguish between the denial to a trader of the right to sell a *particular product* by a unilateral refusal to deal "without more," and the denial of the right of a trader to sell *any product*, as a result of the destruction of the trader's business capability by conspiracy, where the refusal to deal is merely an incident of the conspiracy. Petitioner contends that Stroh had

the right "without more" to refuse to sell its products to petitioner. The rulings of this Court emphatically deny the right of Stroh under the antitrust laws to destroy petitioner's business, good will and organization and its capacity to deal in any other products by an anticompetitive conspiracy aimed at such destruction and "triggered" by a refusal to deal.

Few restraints have been more clearly delineated as competitive evils than the conspiracy or combination to eliminate a single trader from competition in commerce, especially where, as here, a substantial amount of commerce is in issue. As stated in *Binderup vs. Pathe Exchange*, 263 U. S. 291 (1923) at 312:

> "It is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it. * * *"

Contrary to the settled course of the decisions of this Court, the court below held that the complaint failed to state a cause of action on account of the destruction of a competitor because the "*substitution* of one distributor for another of a single competitor in a competitive market * * * does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and * * * is not an unreasonable restraint of trade." (*Infra*, p. 33, Appendix A.)

This Court has stated that the Sherman Act "is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved." *United States vs. Yellow Cab Co.*, 332 U. S. 218, 226 (1947).

This Court has also held, without examining the strength of the remaining competition, that a restraint obviously affecting "the liberty of a trader to engage in business" is within the prohibitions of the Sherman Act.

Binderup vs. Pathe Exchange, 263 U. S. 291, 312 (1923); *Loewe vs. Lawlor*, 208 U. S. 274, 293 (1908); cf. *Radovich vs. National Football League*, 352 U. S. 445, 453-454 (1957); *United States vs. National Retail Lumber Dealers Assn.*, 40 F. Supp. 448, 458 (D. Colo. 1941).

The "public injury" basis for decision articulated by the court below would appear to have been disposed of by the holding of this Court in *Poller vs. Columbia Broadcasting System*, 368 U. S. 464, 473 (1962) that:

> "To the extent that this argument suggests that there is no violation of the antitrust laws because the public will still receive the same service, it has been foreclosed by this Court's decision in *Klor's, Inc. v. Broadway-Hale Stores*, 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959). And *if it is meant to say that there was no restraint because CBS in canceling its affiliation with WCAN was merely doing what it had a right to do and the resulting demise of WCAN followed from normal market conditions, it erroneously assumes that CBS had an absolute right despite violations of the antitrust laws to exercise its contractual privilege.*" (Emphasis supplied.)

Nor can the unlawful character of the conspiracy under the antitrust laws be shielded by petitioners failure to allege that the object of the conspiracy was to control prices or to monopolize. In *Times Picayune Publishing Co. vs. United States*, 345 U. S. 594, 622 (1953), this Court held that "even otherwise reasonable trade arrangements must fall if conceived to achieve forbidden ends * * *" The complaint in the case alleges that the purpose of the conspiracy or combination was to stifle a competitor—"the very type of thing the Sherman Act condemns." *Northern Pacific Ry. Co. vs. United States*, 356 U. S. 1 (1958) at 8. The Court of Appeals does not suggest or offer any "legitimate business aims." The allegations of the complaint

show plainly a conspiratorial disabling of petitioner not only from dealing in a *particular brand of beverage* but a destruction of plaintiff's capacity as a distributor of any beverages.

To paraphrase the holding of this Court in *Poller vs. Columbia Broadcasting System*, 368 U. S. 464, at 469, petitioner alleges "much more than the free exercise * * * of the granted right of cancellation." A conspiracy is alleged to restrain trade in the Youngstown beverage market by forestalling competition with the products of Stroh and with its new distributor, Kohn, Inc.; to eliminate petitioner from that market; and to secure petitioner's operative instrumentalities, to wit: its experienced managerial and driver-salesmen force by secret tortious means; and "the right of cancellation was merely one of the means used to effectuate this conspiracy." 368 U. S., at 469.

The distinction between a conspiracy to wreck a business or to eliminate a competitor, and the exercise "without more" of a refusal to deal is articulated in the dissenting opinion of Judge Washington in the District of Columbia Court of Appeals decision in *Poller*, 284 F. 2d 599, at 607:

> "Packard Motor Car Co. v. Webster Motor Car Co., 100 U. S. App. D. C. 161, 243 F. 2d 418, cert. denied, 355 U. S. 822 (1957), is not dispositive here. Upon loss of its franchise to sell Packard automobiles, the retailer dealer involved could use its properties in a variety of ways, including the sale of other automobiles in competition with the Packard automobile."

In its insistence upon allegations and proof of "public injury" as a prerequisite to a finding that Stroh's wrongfully exercised its right of cancellation, the Court of Appeals would appear to be plunging the law into the morass envisaged by the *Memorandum for the United States as*

Amicus Curiae on Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in *Klor's Inc. v. Broadway-Hale Stores*, 1958-76, at 5:

> "It is difficult to perceive how or at what point the lower court would determine that the elimination of individual enterpreneurs had passed permissible bounds. The (lower) court has failed to recognize that the sum-total effect of the elimination of a number of individual traders as a result of many diverse restraints is not negligible from the standpoint of public injury, even if in each case the public may patronize numerous other traders. In our view, the result of such eliminations would be a most serious encroachment on that optimum economic environment at which the Sherman Act aims. See *Northern Pacific Ry. Co. v. United States*, 356 U. S. 1, 4-5."

The Court of Appeals would recognize the unlawfulness of a refusal to deal undertaken in the interest of anti-competitive practices which pose *threats* to competitors and competition, such as price-fixing or an intent to monopolize, as in *U. S. vs. Parke-Davis*, 362 U. S. 29 (1960) and *Lorain Journal Co. vs. United States*, 342 U. S. 143 (1951). A *group* refusal to deal, as in *Klor's vs. Broadway-Hale Stores*, 359 U. S. 207 (1959), *intended* to eliminate a competitor is also viewed by the Court of Appeals as unlawful. But where, as here, the conspiratorial refusal to deal *has achieved* the exclusion of the competitor, the court below views the refusal to deal as of no significance. The result is patently unjust.

This Court has repeatedly admonished that the individual refusal of the right to deal is limited by the Sherman Act "if accompanied by *unlawful conduct or agreement* or conceived in monopolistic purpose or market control. * * *" *Times Picayune Publishing Co. vs. United*

States, 345 U. S. 594, at 625; *Poller vs. Columbia Broadcasting Co.*, 368 U. S. 464 at 469.

The complaint in the case at bar has alleged the unlawful agreement by the respondents, and the conspiracy or combination is pleaded in detail. The combination or conspiracy alleged is plainly the "unlawful agreement" or "conduct" which is the forbidden companion of the refusal to deal.

In *United States vs Socony Vacuum Oil Co.*, 310 U. S. 150 (1940), Footnote 59 this Court stated:

> "* * * And it is likewise well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. Nash v United States, 229 U. S. 373, 378, 33 S. Ct. 780, 782, 57 L. Ed. 1232. *It is the 'contract, combination * * * or conspiracy, in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.* See United States v. Trenton Potteries Co., 273 U. S. 392, 402, 47 S. Ct. 377, 381, 71 L. Ed. 700, 50 A. L. R. 989. Cf. Retail Lumber Dealer's Ass'n v. State, 95 Miss., 337, 48 So. 1021, 35 L. R. A., N. S., 1054. And the amount of interstate or foreign trade involved is not material (Montague & Co. v. Lowry, 193 U. S. 38, 24 S. Ct. 307, 48 L. Ed. 608), since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. Steers v. United States, 6 Cir., 192 F. 1, 5. Patterson v. United States, 6 Cir., 222 F. 599, 618, 619." (Italics supplied.)

As the Court of Appeals for the Sixth Circuit stated in *Patterson vs. United States*, 222 Fed. 599, 620 (6th Cir. 1915) cert. den. 238 U. S. 635 (1915) (the *National Cash Register* case):

> "* * * We have seen that conspiracies in restraint of trade and commerce are not confined to conspiracies by competitors, or on behalf of a competitor against

a competitor. It is not even necessary that the execution of the conspiracy be of any benefit to the conspirators. *It is sufficient that it will restrain the interstate trade or commerce of the person conspired against.*" (Emphasis supplied.)

The illegality of the conspiracy or combination alleged by the complaint is aggravated by the ruthless and predatory unfair competition by which the conspiracy was executed. Although the Ohio law of unfair competition is unclear, the complaint alleges a tortious "business wrecking" by the induced removal *en masse* of the bases of petitioner's business capability, its staff of driver-salesmen. 2 *Callman, Unfair Competition* (2d Ed.) 591-593; *Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618, 136 Atl. 2d 838 (1957); *Bausch & Lomb Optical Co. vs. Wahlgren*, 1 F. Supp. 799, 801 (N. D. Ill., 1932); *International Tailoring Co. vs. Lucas*, 64 N. Y. S. 2d 879 (1946); *A. S. Rampbell vs. Hyster*, 3 N. Y. 2d 369, 144 N. E. 2d 371 (1957); *Restatement of Agency*, 2d, Section 393, Comment (e); *Callman, Boycott & Price War: Violation of the Anti-trust Laws or Unfair Competition*, 23 O. St. L. Journal, 128 at 141-142.

As this Court held forty-five years ago in *Hitchman Coal & Coke Co. vs. Mitchell*, 245 U. S. 229, 259 (1917):

> "* * * Certainly, if a competing trader should endeavor to draw customers from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition."

The conspiracy alleged in the case at bar also involved the perversion of the duty of loyalty of managerial employees to disclose to petitioner material facts concerning

its business: the impending loss of the distributorship and the fact that another distributor was already active in the territory and was secretly preparing to take over not merely petitioner's product but also its operating personnel.

The tortious character of the course of conduct alleged is clear. 2 *Ohio Jurisprudence* 2d "Agency," Sections 110 to 114, pages 167 to 171; *Restatement of Agency* 2d Sections 376, 381, 387, 391 and 392.

The conspiracy and the accompanying predatory conduct alleged negate the conclusion of the court below that Stroh's "without more" refused to deal with petitioner. The limitations upon the individual lawful refusal to deal have been well-put by Professor Oppenheim in *Selected Antitrust Developments*, 15 A. B. A., Antitrust Sections 37, 43 (1959):

> "* * * a seller, acting unilaterally, has the discretion to select the person with whom he will deal or continue to deal. The over-all limitation is misuse or abuse of this discretion when there is proof of any one of a number of plus elements of liability that may taint the otherwise lawful individual refusal to deal.
>
> These plus elements include, among others, the following major species of illegality: (1) tortious conduct constituting unfair competition or unfair trade practices at common law; (2) violation of a civil rights statute or other type of constitutionality valid statute limiting refusals to deal; and (3) conduct otherwise in violation of the Sherman Act, the Clayton Act, Section 5 of the Federal Trade Commission Act or any applicable state antitrust statute."

It would seem clear that the result reached by the court below is plainly at variance with the rulings of this Court, and with the basic purpose of the antitrust laws to remove restraints upon competitors.

II.

The decision of the court below is in conflict with the decisions of the courts of appeal for the First, Second and Ninth Circuits.

The writ of certiorari should be granted in this case not only because the decision below patently conflicts with the applicable decisions of this Court, but is also in direct conflict with decisions of the Court of Appeal for the First, Second and Ninth Circuits.

In the First Circuit, the Court of Appeals has rendered a series of decisions over the last thirty years holding that a conspiracy to wreck a business by means of the tortious perversion of the duty of loyalty of trusted managerial employees, accompanied by the inducement of trained employees to leave to enter the employ of a competitor, was a conspiracy in violation of Section 1 of the Sherman Act.

In *Albert Pick-Barth Co., Inc. vs. Mitchell Woodbury Corp.*, demurrer overruled, 41 F. 2d 148 (1st Cir., 1930), *judgment in favor of plaintiff affirmed*, 57 F. 2d 96 (1st Cir., 1932), plaintiff, an interstate dealer in kitchen equipment and utensils, alleged that two of its trusted employees, having access to its records, plans and customer lists, conspired with plaintiff's competitor to destroy its business.

This conspiracy was accomplished by defendants leaving plaintiff's employ and entering into the competitor's employ taking with them the confidential records. They also induced trained employees to leave without notice and to commence employment with the competitor. Before leaving, the two employees secretly solicited plaintiff's customers on behalf of the competitor.

In overruling the demurrer, the First Circuit held (41 F. 2d 150):

> "It can hardly be said that allegations that the defendants entered into a conspiracy to restrain the competition of the plaintiff in trade and commerce among the several states, and to deprive it of its business and to obtain that business for the defendant, do not charge with substantial certainty an intent to restrain commerce and the full and free flow of interstate competition."

The Court, in affirming judgment for plaintiff on the second appeal in the *Albert Pick-Barth* case, went on to formulate the rule enunciated by this Court in *Klor's Inc. vs. Broadway Hale Stores, Inc.*, 359 U. S. 207 (1959) and *Radiant Burners, Inc. vs. People's Gas, Light & Coke Co.*, 364 U. S. 656 (1961):

> "To constitute an offense under section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what extent. Nor is it necessary under this act, as it is at common law, to prove any overt acts in order to constitute the offense defined in section 1; but if overt acts are proved in furtherance of the offense defined in section 1, and any one is thereby injured in his business or property, the conspirators under section 7 of the act are liable therefor." (57 F. 2d at 102.)

The *Atlantic Heel Co.* case, 284 F. 2d 879 (1st Cir., 1960) involved a situation similar to that in the *Albert Pick-Barth* case. In the *Atlantic Heel* case, a director of the plaintiff conspired with other defendants to establish a business competitive with plaintiff, enticed the manager of plaintiff's factory and other key employees to leave plaintiff, interfered with plaintiff's source of supply and stole valuable and confidential trade secrets. The plaintiff then went on to allege "that the course of action under-

taken by defendants has had and will have the effect of eliminating plaintiff from and restraining plaintiff in its position as one of the leading concerns in the supply of leather and leather-board heels."

After reviewing the decisions of this Court, the Court of Appeals for the First Circuit concluded (284 F. 2d, at 884):

> "Viewing the conspiracy alleged in the instant case, we believe that the purpose of destroying a competitor by means that are not within the area of fair and honest competition is a purpose that clearly subverts the goal of the Sherman Act. It constitutes an interference with the natural flow of interstate commerce which would exist under conditions of fair and honest rivalry for the buyer's trade. See Package Closure Corporation v. Sealright Co., 2 Cir., 1944, 141 F. 2d 972, 977-978."

In *Syracuse Broadcasting Corporation vs. Newhouse*, 236 F. 2d 522 (2nd Cir., 1956), the Court of Appeals for the Second Circuit had before it a "refusal to deal" arising out of unit or combination advertising by two newspapers in Syracuse, New York, a refusal to accept newspaper advertising unless a defendant broadcasting company under common control with the newspapers also received advertising, the circulation of false statements concerning plaintiff, and the providing by the newspaper defendant of unfair publicity advantages to the affiliated broadcasting company which were not made available to plaintiff.

The Court of Appeals affirmed the trial court's granting of a motion for summary judgment with respect to an allegation of defendant's "intent to monopolize" in violation of Section 2 of the Sherman Act since Syracuse then had two newspapers and five radio stations, and defend-

ant's share of the total advertising revenue was too low to warrant any inference of monopolization.

The Court of Appeals reversed, however, the trial court's granting of summary judgment with respect to plaintiff's allegations that defendants conspired to put plaintiff out of business and to remove it from the scene as a competitor. Said the court (236 F. 2d at 526):

> "* * * this reasoning [with respect to 'monopolization] does not dispose of plaintiff's claim that defendants have conspired to violate the prohibition against unreasonable restraints of trade by the newspapers' unit advertising arrangement and the alleged concert of action by defendants in circulating false rumors about plaintiff, refusing to publish any praiseworthy items about WNDR, and giving discriminatory advantages to WSYR, *all for the alleged purpose of putting plaintiff out of business and removing it from the scene as a competitor*. Nor does the Times-Picayune case foreclose this issue, as the court was careful to point out that 'We do not determine that unit advertising arrangements are lawful in other circumstances or in other proceedings.' 345 U. S. at page 627, 73 S. Ct. at page 890. Moreover, the court's decision that the Times-Picayune arrangement was lawful stressed the fact that 'competitive business considerations * * * actuated the adoption of the unit rate,' that the Government did not prove an intent to restrain trade, and that the competitor newspaper was not shown to have been harmed by the arrangement. 345 U. S. at pages 614-627, 73 S. Ct. at page 888." (Italics supplied.)

In the Ninth Circuit, *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 284 F. 2d 1 (9th Cir., 1960), *modified*, 289 F. 2d 933 (1961), *reversed on other grounds*, 370 U. S. 19 (1962), involved a fact situation directly analogous to that alleged here. In that case, there were two supplier-defendants, Sunkist Growers, Inc., a

non-profit agricultural cooperative, engaged in the growing and selling of Valencia oranges, and Exchange Orange Products Co. (referred to in the opinion as "EOP"), a wholly owned subsidiary of Sunkist, engaged in the processing of Valencia oranges and the selling of juice. There were two additional conspirators, TreeSweet and Silzle, corporations engaged in the production and selling of canned Valencia orange juice. The plaintiff was a competitor of EOP, TreeSweet and Silzle in producing and selling canned Valencia orange juice. It was proved that Sunkist, EOP, TreeSweet and Silzle entered into a vertical conspiracy whereby Sunkist and EOP agreed with the two other conspirators not to sell Valencia oranges to plaintiff, but rather to sell said oranges to TreeSweet and Silzle.

The trial court instructed the jury "that EOP had a legal right to refuse to contract with Winkler *unless such refusal was some part of a violation of antitrust laws.*" The trial court then went on to give an instruction which, except for the names of the parties and the products, could be applied in *haec verba* to this case (284 F. 2d at 20 Footnote 22):

> "* * * If you find that either or both of the defendants combined with TreeSweet or Silzle to eliminate the competition of the plaintiff in the market for citrus fruit juices, particularly single-strength Valencia juice processed in California and sold in interstate commerce, and that any of the acts charged to have been performed by such defendants were performed in furtherance of such combination or conspiracy, and that the performance of any such acts was the proximate cause of any damage to the plaintiff, you should find that there was a violation of the antitrust laws

On rehearing, the Ninth Circuit merely modified its original opinion so as to eliminate any doubt as to its holding that a specific intent to injure the plaintiff need not be proved.

and proximate causation, and you should proceed to the question of damage."

The charge was held by the Ninth Circuit to be a correct statement of the law.

The ruling of the Court of Appeals for the Ninth Circuit in *Sunkist Growers* was foreshadowed in *Flintkote Company vs. Lysfjord*, 246 F. 2d 368 (9th Cir., 1957), at 376.

III.

The course of decision below requires the exercise of this Court's power of supervision both by reason of an application of incorrect rules of law to completed conspiracies to restrain trade, and by further reason of the misapplication of summary procedures to allegations of fact.

The course of decision in the courts below appears clearly to require the exercise of this Court's power of supervision. Their holdings would make nonactionable a completed conspiracy, which destroyed a competitor's business, unless plaintiff could demonstrate a resulting competitive impact of the conspiracy in the market place.

Having reached this conclusion, the lower court proceeded to compound its error. The complaint specifically alleges injury to competition both at the manufacturing level and at the wholesaler level, since the conspiracy was designed "to eliminate plaintiff as a beer distributor in interstate commerce, and thereby to suppress competition in commerce with the said Kohn, Inc. in the sale of Stroh's beer." The court nevertheless ruled that the anticompetitive effects alleged did not, *as a matter of law*, "eliminate or materially diminish the existing competition of the distributors of other beers."

The result of the lower court's ruling was to require petitioner to make a showing of "public injury" on the one

hand, while on the other, to deny it the opportunity to make its proofs. Neither common sense nor the settled rulings of this Court sanction either conclusion.

This Court has frequently admonished against the summary drawing of inferences that competition will not be adversely affected in a market area of industry. *Poller vs. Columbia Broadcasting System*, 368 U. S. 464, at 473; cf. *White Motor Company vs. United States*, 372 U. S. 253 (1963).

CONCLUSION.

Petitioner believes that the issues on this petition for writ of certiorari are of great public importance. The cases before this Court would seem increasingly to involve the relations between manufacturers and distributors. At its last term alone, this Court decided *White Motor Company vs. United States*, 372 U. S. 253 (1963), and *Federal Trade Commission vs. Sun Oil Co.*, 371 U. S. 505. Both involved manufacturer-dealer relations.

A great many small business men in the United States devote their capital and efforts to the promotion and sale of the products of others. The clear delineation of the manufacturer's right to refuse to deal is of great importance of great numbers of people. The business practices sanctioned by the courts below gravely threaten the small businessman. The courts below sanction not only the withdrawal of product by right of customer selection, but also the destruction by conspiracy of the wholesaler's capacity thereafter to continue in business.

As stated in *A. C. Becken Co. vs. Gemex Corp.*, 272 F. 2d 4, 3 to 4 (Seventh Cir., 1959), *cert. den.* 363 U. S. 962 (1960):

> "* * * A wrench can be used to turn bolts and nuts. It can also be used to assault a person in a robbery.

Like a wrench, a manufacturer's right to stop selling to a wholesaler can be used legitimately; but it *may not* be used to accomplish an unlawful purpose."

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September 4, 1963.

APPENDIX A.

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Appeal Nos. 14,808 and 14,974.)

Decided June 11, 1963.

Before: CECIL, Chief Judge, MILLER and O'SULLIVAN, Circuit Judges.

MILLER, Circuit Judge. The plaintiff, Ace Beer Distributors, Inc., brought this action under the Sherman Antitrust Act and the Clayton Act, Sections I, *et seq.*, Title 15 United States Code, seeking triple damages in the amount of $750,000.00 from the eight defendants, who are the appellees in these two appeals, for alleged violation of the provisions of the Antitrust Laws. Diversity of citizenship does not exist and jurisdiction is restricted to the alleged violation of the antitrust laws. Section 15, Title 15, United States Code.

Following the filing of the complaint, the plaintiff moved for a preliminary injunction which the District Judge denied. This ruling was affirmed by this Court without opinion. *Act Beer Distributors, Inc. v. Kohn, Inc., et. al.*, 280 F. (2) 424, C. A. 6th. Answers to the complaint were promptly filed by the various defendants and extensive discovery proceedings were undertaken by both sides. The action was pretried in May 1961. Thereafter, and before trial, six of the defendants, who are appellees in appeal No. 14808, concluded that the complaint did not state a claim upon which relief could be granted and on June 30, 1961, they moved for judgment on the pleadings upon the ground that the complaint failed to state a claim upon which relief could be granted. On November 8, 1961, the District Judge sustained this motion

and entered an order dismissing the action. Appeal No. 14808 followed. Two of the defendants, The Stroh Brewery Company and Morton R. Engel, its Ohio Sales Manager, did not join in the motion, but later filed their separate motion to the same effect, which the District Judge sustained by order of March 2, 1962. Appeal No. 14974 was taken from that order. The appeals have been consolidated in this Court.

Appellant's brief states in considerable detail the facts as developed by the pretrial depositions and the argument on appeal is based to a large extent upon appellant's evaluation of this testimony. Appellees not only disagree with this evaluation of the testimony but take the position that since the only question before the Court on this appeal is whether the complaint states a claim upon which relief can be granted the pretrial testimony discussed by the appellant is not before the Court and should not be considered. We are of the opinion that this is the correct view in the matter. Accordingly, our consideration of this appeal will be restricted to the allegations of the complaint.

The material allegations of the complaint are as follows: The defendant Stroh Brewery Company, hereinafter referred to as Stroh, is an Arizona corporation having its principal place of business in Detroit, Michigan. The plaintiff is an Ohio corporation and a wholly owned subsidiary of the Genesee Distributing Company, hereinafter referred to as Genesee. At the times referred to plaintiff and Stroh were engaged in interstate commerce. Stroh's beer moved from Detroit, Michigan in a regular continuous and uninterrupted flow to distributors and ultimate users in Ohio.

Since the year 1936 Genesee and Stroh had been operating under an agreement which was to be in full force and effect for an indefinite term wherein Genesee

was designated the exclusive distributor in Mahoning and Trumbull Counties, Ohio of beer and other products manufactured by Stroh. In January 1956, Genesee and Stroh agreed that Genesee would set up a separate organization to distribute Stroh products exclusively. Accordingly, Genesee caused the plaintiff, Ace Beer Distributors, to be incorporated, whereupon the plaintiff was substituted for Genesee as the exclusive Stroh distributor in Mahoning and Trumbull Counties, Ohio.

Stroh was the only company for which the plaintiff acted as a distributor and it was the plaintiff's sole source and supply of merchandise for distribution and sale. Plaintiff fulfilled every requirement of its distributorship agreement and exerted its best offorts to sell and promote the sale of Stroh's products, and to that end incurred considerable sales and advertising expenses.

The complaint alleges that thereafter the defendants maliciously conspired to destroy plaintiff's business and to eliminate plaintiff as a beer distributor in interstate commerce and that the following steps were taken to consummate said conspiracy. The defendants secretly agreed that Stroh would cancel plaintiff's distribution franchise without giving plaintiff any prior notice and would simultaneously issue a new franchise to a corporation, Kohn, Inc., to be formed by the defendants, The Kohn Beverage Company, Pauline Kohn, and Adam J. Kohn; that pursuant to this conspiracy the defendants caused Kohn, Inc. to be incorporated on March 30, 1959; that the defendants, under false names and without disclosing the intended purpose, thereafter negotiated a lease for a suitable building in the Youngstown area from which Kohn, Inc. could operate; that the defendants further obtained a fleet of trucks from the Kohn Beverage Company of Akron, Ohio which were placed in readiness to commence

operations as soon as Kohn, Inc. obtained a permit from the Ohio Department of Liquor Control and as soon as plaintiff's Stroh franchise was cancelled; that Kohn, Inc. obtained a permit from the Ohio Department of Liquor Control on April 17, 1959; that in furtherance of the conspiracy the defendants, or some of them, contacted plaintiff's manager, the defendant Stephen Zarich, a long trusted and key employee of the plaintiff, and also contacted his brother, the defendant Peter Zarich, Genesee route superintendent, who was also a long trusted and key employee, for the purpose of reaching a secret agreement with them that they would join the staff of Kohn, Inc. upon the obtaining by Kohn, Inc. of the distributorship of Stroh's beer in Mahoning and Trumbull Counties, Ohio; that at the instance of the defendants, Stephen Zarich and Peter Zarich contacted plaintiff's truck drivers and salesmen to induce them to leave the plaintiff en masse; on April 20, 1959 Stroh, tortiously and in furtherance of the conspiracy, cancelled plaintiff's franchise for the distribution of Stroh's beer and then promptly commenced selling merchandise to Kohn, Inc. for distribution and sale in Mahoning and Trumbull Counties, Ohio; that immediately after Stroh's cancellation of plaintiff's franchise, Stephen Zarich and Peter Zarich left their respective employments without any notice to their respective employers, and all but two of plaintiff's drivers and salesmen suddenly without notice to the plaintiff quit its employ on that day and immediately began employment with Kohn, Inc.; that the defendants knew that in the then state of the Youngstown labor market it would be impossible for plaintiff to hire other employees with comparable training and experience and that plaintiff's business would necessarily be destroyed, and that defendants have substantially destroyed plaintiff's business and have substantially de-

stroyed plaintiff as a beer distributor in interstate commerce.

The District Judge in a Memorandum Opinion carefully analyzed the allegations of the complaint and concluded that even if it be conceded that a conspiracy existed, the object to be achieved was not one rendered obnoxious by the Sherman Act. Relying strongly upon *Schwing Motor Company v. Hudson Sales Corp.*, 138 F. Supp. 899, affirmed 239 F. (2) 176, C. A. 4th, cert. denied, 355 U. S. 823, and *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. (2) 418, C. A. D. C., cert. denied, 355 U. S. 822, he entered judgments dismissing the complaint as to all defendants.

In considering the issue in this case, it must be kept in mind that plaintiff is not seeking a recovery for an alleged breach of contract or damages based on any common law action for tortious interference with contract rights or for unfair competition or for any common law tort. Whether a right of damages exists in some other action based on breach of contract or tort, is not before us in this case. Whether a cause of action exists under the anti-trust laws is the sole issue in this case. In that connection it is well settled that tortious conduct against one engaged in interstate commerce or which has an effect on interstate commerce does not automatically constitute a violation of the Sherman Act. *Apex Hosiery Co. v. Leader*, 310 U. S. 469; *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127; *Hunt v. Crumboch*, 325 U. S. 821.

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: * * *" Section 2 of the Act makes illegal any

conspiracy to monopolize any part of the trade or commerce among the several states. Section 15 confers a right of action for triple damages upon any person injured in his business or property by reason of anything forbidden in the antitrust laws.

In essence, the complaint charges that the defendants conspired to destroy plaintiff's business and to eliminate it as a beer distributor in interstate commerce and that this result was accomplished by the termination by Stroh of plaintiff's franchise as its beer distributor and thereafter conducting its business through another distributor. Paragraphs 13 and 17 of the complaint.

That, without the results proscribed by the Sherman Act, is not a violation of the Act. A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself. *United States v. Colgate & Co.*, 250 U. S. 300. A refusal to deal becomes illegal under the Act only when it produces an unreasonable restraint of trade, such as price fixing, elimination of competition or the creation of a monopoly. *United States v. Parke, Davis & Co.* 362 U. S. 29, 32; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211; *Lorain Journal Co. v. United States*, 342 U. S. 143. The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the Act.

The present case does not involve price fixing. Nor does it involve an attempt to create a monopoly. The Stroh Brewery Company had one distributor in the territory under consideration before it terminated the plaintiff's franchise. It continued to have only one distributor thereafter. There is no allegation or contention that the beer of other breweries was not just as available in that area

after the change in distributors as it was before. See: *United States v. E. I. du Pont de Nemours & Co.*, 351 U. S. 377.

Unless it can be said that the refusal to deal with plaintiff had the result of suppressing competition and thus constituted "restraint of trade" within the meaning of Section 1 of the Sherman Act, there is no violation of the Act. We do not think that the substitution by Stroh Brewery Company of one distributor for another had this result.

It is well settled that the "restraint of trade" referred to in Section 1 of the Act, means only unreasonable restraint of trade, in that, as the cases point out, every commercial contract has some restraining effect upon trade. *Standard Oil Co. v. United States*, 221 U. S. 1, 51; *United States v. American Tobacco Co.*, 221 U. S. 106, 179-180; *Chicago Board of Trade v. United States*, 246 U. S. 231, 238-239. The substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade. *Hohensee v. Akron Beacon Journal Publishing Co.*, 171 F. Supp. 90, 174 F. Supp. 450, affirmed 277 F. (2) 359, C. A. 6th, cert. denied, 364 U. S. 914; *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 214 F. (2) 891, C. A. 5th, cert. denied, 348 U. S. 912.

Plaintiff relies strongly upon *Klor's v. Broadway-Hale Stores*, 359 U. S. 207, and two cases from this Court, *Englander Motors v. Ford Motor Co.*, 267 F. (2) 11, C. A. 6th and *Crane Distributing Co. v. Glenmore Distilleries*, 267 F. (2) 343, C. A. 6th. The factual differences between those cases and our present case are very material. The *Klor* case involved a group boycott or concerted refusal by a number of traders to deal with a single trader.

It was not, as the opinion expressly stated (p. 212) a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Both the *Englanders Motors* case and the *Crane* case involved price fixing. Their rulings are accordingly not applicable to the present case.

We are of the opinion that the District Judge was not in error in dismissing the complaint. *Schwing Motor Company v. Hudson Sales Corp.*, *supra*, 138 F. Supp. 889, affirmed 239 F. (2) 176, C. A. 4th, cert. denied, 355 U. S. 823; *Packard Motor Car Co. v. Webster Motor Car Co.*, *supra*, 243 F. (2) 418, C. A. D. C., cert. denied, 355 U. S. 822; *Parmelee Transportation Co. v. Keeshin*, 292 F. (2) 794, C. A. 7th, cert. denied, 368 U. S. 944, rehearing denied, 368 U. S. 972.

The judgments are affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Like Orders Filed June 11, 1963 in Appeal Nos. 14,808 and 14,974.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ SHACKELFORD MILLER, JR.
United States Circuit Judge.

APPENDIX B.

STATUTES INVOLVED.

Sherman Act.

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *

"7. The word 'person,' or 'persons,' wherever used in Sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Clayton Act.

"4. Any person who shall be injured in his business or property by reason of any thing forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."